IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 347 of 1999
with
CRIMINAL APPEAL No. 169 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MS.JUSTICE H.N.DEVANI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

IMTIYAZ ULLAKHAN NASHRU ULLAKHAN PATHAN & 2 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :

Criminal Appeal No. 347 of 1999
THROUGH JAIL for Appellant(s) : 1 – 3.

MS RV ACHARYA Appointed by Legal Aid.
MR. R.C.KODEKAR, APP for Opponent(s) : 1,

Criminal Appeal No. 169 of 1999
MR. R.C.KODEKAR, APP for Appellant(s) : 1,

MS. SHILPA SHAH for Opponent (s):1,

==========

CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA
and
HONOURABLE MS.JUSTICE H.N.DEVAN

Date : 13th, 18th and 20th September 2007

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Appellant Nos. 1, 2 and 3(“the Accused” for short) were charged and tried by the learned Additional Additional Sessions Judge, Nadiad for commission of the offences punishable under Section 302 of the Indian Penal Code (“IPC” for short) on the accusation that on 5.9.1997 at 9:45 pm the Accused picked up quarrel with deceased Imtiyazullah Khan Amanullah Khan Pathan in connection with the payment of the share of house tax and construction of wall from the deceased. They abetted each other and inflicted fatal blow on chest, abdomen as well as vital parts of the body of the deceased Imtiyazullah Khan Amanullah Khan Pathan as a result of which he died, and thereby committed offence of murder punishable under Section 302 IPC.

2. At the end of the trial, Accused No.1 was found guilty of the offence of murder punishable under Section 302 IPC, whereas Accused Nos. 2 and 3 were found guilty of the offence of “culpable homicide not amounting to murder”, punishable under Section 304 Part II read with Section 114 IPC. They where, therefore, convicted vide judgment and order dated 30.12.1998. Accused No.1 was sentenced to suffer imprisonment for life and fine of Rs.10000/- in default of payment of fine RI for one year, whereas Accused Nos. 2 and 3 were sentenced to RI for 5 years

and fine of Rs.5000/- in default of payment of fine RI for 6 months.

3. The Accused, aggrieved by the judgment and order of conviction and sentence, recorded against them, have filed Criminal Appeal No. 347 of 1999 with the aid of Section 374 of the Criminal Procedure Code (“the Code” for short).

4. The State of Gujarat, also aggrieved by the judgment and order, filed Criminal Appeal No. 169 of 1999 with the aid of Section 378 of the Code against Accused Nos. 2 and 3, challenging the order of acquittal recorded against them for the offences punishable under Section 302 IPC.

5. As both the Appeals are arising out of the same judgment and order, they are heard together, decided and are being disposed of by this common judgment.

6. The prosecution case as disclosed from the FIR and unfolded during trial is as under:

6.1 As per the allegations made by the PW2 - complainant – Faizmohammad Amnullah Khan, his brother Imtiyazullah Khan Amanullah Khan Pathan used to reside at Pathanwada Gundi Falia in Petlad with his wife Munizabibi and used to hawk clothes for his livelihood. Deceased Imtiyazullah Khan Amanullah Khan Pathan was residing on the ground floor of the house and his uncle Nasurullahkhan Dildarkhan used to reside on the upper floor along with his sons.

In the Municipal records, the said house stood in the name of his uncle. His uncle's three sons named Firdos Ullahkhan, Imtiyaz Ullahkhan and Zahid Ullahkhan were living with his uncle in the said house. It is further alleged that his sister-in-law Munizabibi, who is his brother - Imtiyaz's wife, had delivered a child about 20 to 25 days back. On the day of incident, he and his wife Anjumanbibi had gone to inquire about her health at her parental home at Gundi Falia at about 8:30 to 8:45 at night. His sister-in-law's parental house and his brother's house were situated very close to each other in the same lane. Therefore, he and his brother's brother-in-law Mujidkhan Mustufakhan were sitting together at his home and were talking, at that time, at about 9:15 hours, his uncle Nasurullah Khan called him to his house, hence he had gone to his house. At that time his uncle's sons Imtiyazullah Khan, Zahidullah Khan and Firdosullah Khan, and his uncle were present in the house. At that time, his uncle has shown him the municipal house tax bill for Rs.1520/- and asked him to pay half of the same, to which he had replied that they would give their half share, but at present he does not have the means, hence, his brother Imtiyaz would give the same after Diwali. He has also said that in case Imtiyaz does not give the money, he would give it. In the meanwhile, in a little while, his brother Imtiyaz Ullahkhan came upstairs. At

that time Zahid had said that the right side wall of the building was required to be pulled down and constructed afresh as the house was likely to collapse, therefore, they would have to give their half share. Whereupon his brother has said that if they were to pull down the wall at that time then he did not have the necessary funds. At that time Zahid had said that uncle would say nothing and that whatever was to be done was to be done by them. Thereafter Zahid and Firdos got agitated and all the Accused started abusing them, therefore, his brother started climbing down. The Accused one after the other, climbed down after him. On coming down, Firdos had kicked him. Imtiyazullah Khan @ Bobadiyo had a crowbar (*kosh*) in his hand, Zahid had a knife in his hand. Imtiyazullah Khan had dealt a blow on the left side of his brother's chest with a crowbar. He shook the crowbar and removed it from the body and again struck his brother on the head with the crowbar. He also dealt blows with the crowbar on both his hands. Again he dealt a blow with the crowbar below the navel. His brother felt giddy and started falling down, at that time Zahid struck him on the head with the baseball bat. After his brother fell down, Firdos caused injuries on both his hands and both his thighs with a knife. He tried to rescue him, but Zahid had pushed him down, therefore, he had raised shouts. At that time, his sister-in-law Munizabibi, her sisters

Salmabibi and Saliabibi were sitting on a cot in their house and had seen the incident. On shouts being raised all the Accused had fled with the weapons. Thereafter, he and his brother's brother-in-law Mujidkhan and his brother-in-law Dosukhan had taken his brother in a rickshaw to Petlad Government Hospital where the Doctor on examining him, declared him dead.

6.2 Complaint for the aforesaid incident was lodged by PW2 -Faizmohammadkhan Ammanullah Khan Pathan on 5.5.1997 against the Accused for commission of the offence punishable under Section 302 IPC at Petlad Police Station, where it was recorded by PW-9 Bankim Kanakprasad Nanavati, which was sent for registration, which is on record at exh. 18.

6.3 Pursuant to the registration of the complaint, investigation was put into motion. PW-9 Bankim Kanakprasad Nanavati went to the scene of offence and searched for the Accused.

6.4 On 6.9.1997 he held inquest on the dead body of the deceased in the presence of the panchas and drew the panchnama and sent the dead body for autopsy to the Civil Hospital. He has also drawn the panchnama of the scene of offence in presence of the panchas. He also collected control earth, bloodstained earth, and at a little distance from the scene of offence he had collected another sample of control earth and bloodstained earth. During the investigation,

clothes of the deceased were seized by preparing a panchnama. He has recorded the statement of witnesses. On 7.9.1997 the Accused were arrested and an arrest panchnama was drawn in presence of the panchas. At the time of arrest of Accused No.3, there were signs of abrasions on his body near the calf of his leg and also in the middle finger of his right hand. There appeared to be bloodstains on his pant, which was seized in the presence of panchas under panchnama exh. 27. Firdos Ullahkhan had been sent to the hospital for examining the injuries. During the course of further investigation, Accused No.3 expressed his willingness to show the weapon, which had been used for commission of the offence by them. Therefore, preliminary panchnama was drawn in the presence of panchas. Thereafter, at the instance of Accused No.3, crowbar, bat and knife were recovered, which were used for commission of the offence.

6.5 On receipt of the autopsy as well as FSL report, as sufficient incriminating evidence was found against the Accused for commission of the offence of murder of Imtiyazullah Khan Amanullah Khan Pathan, he filed charge sheet against the Accused in the Court of learned JMFC, Petlad.

6.6 As the offence punishable under Section 302 IPC is exclusively triable by the Court of Sessions, the learned JMFC, Petlad committed the

case to the Court of Sessions at Nadiad, where it was numbered as Sessions Case No. 265 of 1997.

6.7 The learned Additional Sessions Judge to whom the case was made over for trial, framed charges against the Accused for commission of the offence punishable under Sections 302 and 114 IPC. Charges were read over and explained to the Accused. The Accused pleaded not guilty to the charges and claimed to be tried. Therefore, they were put to trial by the learned Additional Sessions Judge, Nadiad in Sessions Case No. 265 of 1997.

6.8 In order to prove the charges levelled against the Accused, the prosecution has examined in all 9 witnesses and relied upon their oral testimony, details of which have been given in paragraph 6 of the impugned judgment and order. They are as under:

PW No.	Name and Status	Exhibit	Page No.
1	Dr. Manubhai Ishabhai Ishnava, who performed P.M.	14	87
2	Faizmohmmadkhan Ammanullahkhan Pathan, Complainant and eye witness.	17	125
3	Munizabibi Imtiyazkhan, wife of the deceased – Eye witness.	19	149

PW No.	Name and Status	Exhibit	Page No.
4	Sajidbhai Abbasbhai Mirza, Panch witness.	24	181
5	Ruknuddin Bastrouddin Sheikh, Panch witness.	26	193
6	Mohankumar Ukumal Sindhi	29	209
7	Natubhai Raijibhai Parmar, Panch witness.	30	213
8	Mustaq Ahmed Ismail Shaikh, Panch witness.	33	227
9	Bankim Kanakprasad Nanavati, I.O.	41	247

6.9 To prove the culpability of the Accused, the prosecution has also produced number of documents and relied upon the contents of the same, the details of which have been given in paragraph 8 of the impugned judgment and order, and the same will be discussed hereinafter in detail in this judgment, as and when required.

6.10 After recording of the evidence of the prosecution witnesses was over, the trial Court explained to the Accused, circumstances appearing against them and recorded their further statements under Section 313 of the Code. In their further statements, the Accused denied the case of the prosecution in its entirety. They have stated that a false case has been filed against them. However, they have neither led any evidence nor examined any witness in support of their defence.

6.11 On appreciation, evaluation, analysis and close scrutiny of the evidence on record, the trial Court has come to the conclusion that the prosecution has successfully established the complicity of the Accused in committing the murder of Imtiyazullah Khan Amanullah Khan Pathan. It is also held that there was no previous enmity between the Accused and the victims, it was also not a sudden fight and the deceased had not provoked the Accused No.1 to give fatal blow. Accused No.1 gave fatal blow in the chest as well as abdomen of the deceased. Therefore, his intention was to kill the deceased. So far as Accused Nos. 2 and 3 are concerned, it is held that Accused No.2 has inflicted injuries with Bat on the head of the deceased whereas Accused No.3 has inflicted injuries with bricks. Accused No.3 has also inflicted knife injuries on the leg of the deceased. It is, therefore, held that the act of Accused No.1 was the offence of murder punishable under Section 302 IPC whereas act of Accused Nos. 2 and 3 was the offence of "culpable homicide not amounting to murder" punishable under Section 304 Part II read with Section 114 IPC.

6.12 On the aforesaid finding, the trial Court convicted the Accused No.1 for commission of the offence punishable under Section 302 IPC and the Accused Nos.2 and 3 were convicted for commission of the offence punishable under

Section 304 Part II read with Section 114 IPC. The Accused No.1 was sentenced to imprisonment for life whereas Accused Nos. 2 and 3 were sentenced to suffer RI for 5 years, which has given rise to the instant Appeal, at the instance of Accused.

7. The State of Gujarat has also filed an Appeal challenging the judgment and order acquitting Accused Nos. 2 and 3 of the offence punishable under Section 302 IPC.

8. Ms. R.V.Acharya, learned advocate of the Accused has contended that the prosecution has miserably failed to prove the guilt of the Accused beyond reasonable doubt. The Accused are falsely roped in on account of enmity with the deceased in connection with payment of half of the share of the house tax as well as construction / repair of the wall. No independent witnesses have been examined. According to her, both the eye witnesses are near and dear relatives of the deceased, therefore, no reliance can be placed upon their oral testimony. All the panch witnesses have not supported the prosecution case and therefore the contents of the panchnamas are not proved. According to her, the complicity of the Accused for commission of offence of murder of Imtiyazullah Khan Amanullah Khan Pathan is not established beyond reasonable doubt. The judgment and order convicting Accused No.1 for commission of offence

punishable under Section 302 IPC, and convicting Accused Nos. 2 and 3 for commission of offence punishable under Section 304 Part II IPC, deserve to be quashed and set aside by acquitting them of the offences with which they were charged.

9. Ms. R.V.Acharya, learned advocate of the Accused has also emphasized that the Appeal filed by the State of Gujarat, challenging the acquittal of Accused Nos. 2 and 3 for the offence punishable under Section 302 IPC has no basis and substance. She, therefore, urged that the Appeal filed by the Accused deserved to be allowed by quashing and setting aside the judgment and order of sentence and thereby acquitting the Accused for the offence with which they were charged. She, therefore, urged to Allow Criminal Appeal No. 347 of 1999 filed by the Accused, and dismiss Criminal Appeal No. 169 of 1999 filed by the State of Gujarat.

10. Per contra Mr. R.C.Kodekar, learned APP has vehemently submitted that the trial Court has recorded a categorical finding about the guilt of the Accused and the complicity of the Accused is established by the prosecution on the basis of the evidence of PW-2 Faizmohammad Khan Ammanullahkhan Pathan and PW-3 Munizabibi Imtiyazkhan, who are eye witness to the incident. He has also emphasized that the Accused have committed the offence of murder of

deceased Imtiyazullah Khan Amanullah Khan Pathan, with intention and in pre-planned manner. Therefore, the trial Court ought to have convicted all the Accused under Section 302 IPC. It is, therefore, submitted that the Appeal filed by the Accused deserves to be dismissed and the Appeal filed by the State of Gujarat deserves to be allowed by convicting the Accused Nos. 2 and 3 also for commission of the offence of murder of deceased Imtiyazullah Khan Amanullah Khan Pathan punishable under Section 302 IPC. He, therefore, urged to dismiss Criminal Appeal No. 347 of 1999 filed by the Accused and allow Criminal Appeal No. 169 of 1999 filed by the State of Gujarat, and thereby convict the Accused Nos. 2 and 3 for commission of the offence of murder of deceased Imtiyazullah Khan Amanullah Khan Pathan punishable under Section 302 IPC.

11. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record, which is read and re-read by the learned advocates of the parties with reference to broad and reasonable probabilities of the case. This Court has examined the entire evidence on record for itself independently of the learned Judge of the trial Court and considered the arguments

advanced on behalf of the Accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

12. There is no dispute to the fact that the deceased died a homicidal death. To prove this fact, prosecution has examined and relied upon the evidence of PW-1 Dr. Manubhai Ishabhai Ishnava of S.S.Hospital, Petlad at exh. 14. Dead body of the deceased was brought to him for postmortem. He had performed the postmortem on the dead body of the deceased. He had also issued autopsy report which is on record at exh. 15. As many as 12 external injuries were noted in column no. 17 of the PM Note at exh. 15. They are as under:

(i) On (lt) upper Chest – in area of 3rd, 4th Ribs – Nipple line below clavicle area CLW – in size of 6 cm x 2 ½ cm x 15 cm deep – Full of blood.

(ii) On (Rt) side – near umbilical oval shape – Transverse CLW – 4 cm x 2 cm x 10 cm deep – would covered with Fat tissue.

(iii) On (Lt) middle thigh – Inner surface oblique CLW in 4 cm x 2 cm x 6 cm deep.

(iv) On (Rt) thigh – middle – anti surface vertical CLW in size 4 cm x ½ cm x 3 cm covered with blood clots.

(v) On (Rt) Forearm superior surface Incision near wrist wound in oblique – Transverse direct in size of 8 cm x 3 cm x muscle deep.

(vi) On (Rt) Forearm – middle area – superior incision wound in 4 cm x 2 cm x skin deep.

(vii) On antr chest. Rt to left – linear oblique superficial incised laceration 12 cm x subcutaneous covered with blood.

(viii) On nape of Neck CLW in size of 3 cm x 2 cm – muscle deep – oval shape.

(ix) On (lt) thoracic – scapular area CLW in size 4 cm x 1 cm x 2 cm deep covered with blood clots.

(x) On (lt) Deltoid region transverse oblique CLW in 6 cm x 2 cm x 4 cm muscle deep – oval shape.

(xi) On (lt) Deltoid area vertical oval shape CLW in 4 cm x ½ cm – skin deep.

(xii) On (Rt) thigh near Inguinal region oval shape CLW in 3 cm x 2 cm x muscle deep.

So far as the cause of death of the deceased is concerned, in column no. 23 of PM Note the same is stated; “due to Cardio-Pulmonary Failure (shock) followed by Cardio-Pulmonary & Intestinal Punctured with severely Internal

Hemorrhage by fatal puncture wounds and other multiple fatal injuries on various part of body".

13. On conjoint reading of oral testimony of PW-1 Dr. Manubhai Ishabhai Ishanava at exh. 14 and the autopsy report at exh. 15, there is no manner of doubt that the deceased died a homicidal death. The trial Court is, therefore, right in coming to the conclusion that the deceased died a homicidal death. We affirm the said finding.

14. The next question, which is required to be considered by this Court is; as to whether the prosecution has succeeded in establishing the complicity of the Accused in respect of the charges levelled against them?

15. At the outset, it may be noted that there are two eye witnesses of the incident who are near and dear relatives of the deceased. The Accused are cousins of the deceased Imtiyazullah Khan Amanullah Khan Pathan. Therefore, there is neither any question of wrong identification nor any previous enmity. The incident had occurred merely on a trifle issue of claiming half of the share for the payment of house tax as well as construction / repair of the wall, which was requested by the father of the Accused from deceased Imtiyazullah Khan Amanullah Khan Pathan.

16. To establish the aforesaid fact, the prosecution has examined and relied upon oral testimony of PW-2 Faizmohmad Khan at exh. 17. He has inter alia testified that the deceased Imtiyazullah Khan Amanullah Khan Pathan was his younger brother and used to reside at Pathanwala Gundi Falia in Petlad. He used to hawk clothes. His wife's name was Munizabibi and they were both living together. Deceased Imtiyazullah Khan Amanullah Khan Pathan was living on the ground floor at Gundi Falia and his uncle Nasurullahkhan Dildarkhan was residing on the upper floor with his wife and three sons, named Imtiyaz Ullahkhan, Zahid Ullahkhan and Firdos Ullahkhan. It is further testified by him that, as Imtiyaz's wife Munizabibi had delivered a child, on 5.9.1997 at 9 O' Clock in the night, he and his wife Anjumanbibi had gone to inquire about her health at her parental home at Gundi Falia. His brother's house and his brother's in-law's house were situated opposite each other and there was a ten feet road in between. A little while after they had gone there, his aunt had come to call him. She had told him that his uncle Nasurullahkhan's was calling him; hence he had gone to his uncle's house. His uncle, aunt and their three sons were present there. The three sons are the Accused in the present case and were present in the Court. At his uncle's house they had shown him a house tax bill for Rs.1250/- and had asked him what was to be done

in that regard, to which he had replied that they would give their half share, but at present he does not have the means, hence, his brother Imtiyaz would give the same after Diwali. He has also said that in case Imtiyaz does not give the money, he would give it. In the meanwhile in a little while his brother Imtiyaz came upstairs. At that time Zahid had said that the right side wall of the building was required to be pulled down and constructed afresh as the house was likely to collapse, therefore, they would have to give their half share. Whereupon his brother has said that if they were to pull down the wall at that time then he did not have the necessary funds. At that time Zahid had said that uncle would say nothing and that whatever was to be done was to be done by them. Thereafter Zahid and Firdos got agitated and the Accused started abusing them, therefore, his brother started climbing down. The Accused one after the other, climbed down after him. On coming down, Firdos had kicked him. Imtiyazkhan had a crowbar *(kosh) in* his hand, Zahid had a bat like stick in his hand and Firdos had a knife in his hand. Imtiyazullahkhan had dealt a blow on the left side of his brother's chest with a crowbar. He shook the crowbar and removed it from the body and again struck his brother on the head with the crowbar. He also dealt blows with the crowbar on both his hands. Again he dealt a blow with the crowbar below the

navel. His brother felt giddy and started falling down, at that time Zahid struck him on the head with the baseball bat. After his brother fell down, Firdos caused injuries on both his hands and both his thighs with a knife. He tried to rescue him, but Zahid had pushed him down, therefore, he had raised shouts. At that time, his sister-in-law Munizabibi, her sister Salmabibi and Saliabibi were sitting on a cot in their house and had seen the incident. On shouts being raised all the Accused had fled with the weapons. Thereafter, he and his brother's brother-in-law Mujidkhan and his brother-in-law Dosukhan had taken his brother in a rickshaw to Petlad Government Hospital where the Doctor on examining him declared him dead. Thereafter, he had gone to the Police Station and lodged a complaint. He has further testified that the First Information Report exh. 18 is the one lodged by him and he has also admitted his signature on the same.

This witness was cross-examined by the learned advocate of the defence in detail and in great length. So many questions were put to him like; it was not possible to see the incident and which weapon was used by the Accused for commission of the offence, as there was no light. He has repelled the said suggestions. He has denied the suggestions that he has not seen the incident or he has not witnessed the evidence. In cross-examination, this witness

was also consistent with regard to the injuries caused by Accused No.1 and Accused Nos. 2 and 3 to the deceased Imtiyazullah Khan Amanullah Khan Pathan. In sum and substance, this witness has successfully withstood the test of cross-examination, and nothing substantial has been brought out even during his cross-examination, which would impeach the credibility of his evidence.

17. The prosecution has thereafter examined and relied upon the oral testimony of PW-3 Munizabibi Imtiyazkhan at exh. 19. She has testified that her marriage had been solemnized one year and three months prior to the incident. Both her in-law's house as well as her parental home were located at Gundi Falia. Her father-in-law's house was situated at a distance of ten feet from her parental home. She has further testified that she has one son who was born 27 days prior to the incident. When the incident had occurred she was at her parental home because of her delivery. Her husband's brother is named Fiazmahmad. At her in-laws place, her uncle-in-law Nasurullah was residing with his family on the upper floor. His three sons are present in the court and are present as the Accused. She has testified that on the day when the incident took place, at about 8:30 to 8:45 at night her brother-in-law Faizmahmad and her sister-in-law Anjumbibi had come to inquire about her and her son's health. At that time

she and her sister-in-law Salehabibi were at home and were sitting in the lower room of their house. Her husband was at his residence. At that time her aunt-in-law Noorjehanbibi had come and told her brother-in-law that his uncle was calling him. Therefore, her brother-in-law (the complainant) had gone to his uncle's house. At that time her husband was having his meal at his home. After having his meal, her husband had gone to have pan and had returned home immediately. Thereafter he had gone to his uncle's house on the upper floor of his own house. On returning after having pan, her husband had told her by gestures that he was going upstairs to his uncle's place. She had asked him not to go, despite which he had gone upstairs to his uncle's house and 15 to 20 minutes thereafter, he had come down. Imtiyaz @ Bobadiyo had come after him and Javedkhan and Firdoskhan had also come down, and her brother-in-law Faizmahmad had come down after the four of them. After coming down, Accused No.1 Imtiyaz had inflicted a blow with the crowbar on her husband's head. Accused No.2 Javed had struck her husband on his head with the stick that he was holding. Thereafter Accused No.1 Imtiyaz had struck her husband on the chest as well as abdomen with the crowbar. Accused No.3 Firdoshkhan had inflicted blows on her husband on both his hands, both his thighs and abdomen with the knife in his hand and caused injuries.

Consequently her husband had fallen down. As these people were assaulting him, she had raised shouts, hearing which her brother Mujidkhan had come running afterwards. After assaulting her husband the Accused had fled with the weapons. Mujidkhan and others had gathered there and had taken her husband to the hospital in a rickshaw. She had not seen as to who had taken him in the rickshaw. Thereafter, after a short time she had come to know that her husband had expired. She has further testified that the police had recorded her statement on the 6th.

This witness has also been cross-examined at length and in great detail. So many suggestions were put to her with regard to her not having witnessed the incident and her not being present there. She has denied all the suggestions and successfully withstood the test of cross-examination and nothing substantial has been brought on record from her evidence which would impeach the credibility of her evidence.

18. The prosecution has also relied upon the oral testimony of PW-9 Bankim Kanakprasad Nanavati at exh. 41. He has inter alia testified with regard to lodging of the complaint, drawing various panchnamas, arresting the Accused and filing the charge sheet.

19. The prosecution has thereafter examined and relied upon the evidence of **PW-4** Sajidbhai Abbasbhai Mirza at exh. 24 – panch witness of

the scene of offence, **PW-5** Ruknuddin Bastrouddin Sheikh at exh. 26 and **PW-6** Mohankumar Ukumal Sindhi at exh. 29 – panch witness of panchnama of physical condition of the Accused, **PW-7** Natubhai Raijibhai Parmar at exh. 30 and **PW-8** Mustaq Ahmed Ismail Shaikh at exh. 33 – panchwitness of the discovery panchnama of the weapons. It may be noted that all the aforesaid panch witnesses have turned hostile and not supported the prosecution case. It is, therefore, contended by Ms. R.V.Acharya, learned advocate of the Accused that since the panch witnesses have not supported the contents of the panchnama, the same cannot be read in evidence and no reliance can be placed on the said panchnama, and therefore also the prosecution has failed to establish the charge against the Accused on the basis of the said panchnama.

20. The plea that the panch witnesses have turned hostile, and therefore, the evidence adduced by the investigating officer regarding the panchnama, should be disbelieved, is merely stated to be rejected. It is well settled that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over-board as unreliable. It must be realized that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It needs hardly to be emphasized that the decision of a case does not depend

solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses regardless of the evidence of police officers, in theory, it would be giving a right of veto to the panchas so far as the question of culpability of the Accused is concerned, which is not permissible in criminal jurisprudence. It is well settled that without good ground being pointed out, testimony of police officer, if otherwise found to be true and dependable, cannot be discarded by the Court on the ground that he is a police officer. On the facts and in the circumstances of the case, this Court finds that testimony of investigating officer is not only inspiring confidence, but, gets corroboration from the other evidence on record. From his evidence, contents of all the panchnamas have been duly proved and therefore, reliance can be placed on the said piece of evidence and as per the said piece of evidence the Accused has shown willingness to find out muddamal weapon which he had hidden in the place which was shown by him.

21. On overall reappraisal of the evidence of PW-2 Faizmohmmadkhan and PW-3 Munizabibi Imtiyazkhan, and a threadbare scrutiny of the entire evidence on record, it is duly proved that both of them have witnessed the incident. Their presence at the scene of occurrence is natural as they were residing in the ground floor of the same house.

In their presence, Accused No.1 has inflicted two fatal blows on the vital part of chest and abdomen of the deceased with crowbar and Accused Nos. 2 and 3 have inflicted injuries with Bat and Bricks as well as with knife on the deceased. There is no enmity between the deceased and the Accused. They are cousins. Therefore, there is no question of falsely roping the Accused in the crime. Incident had taken place for a trifle issue of sharing the half of the amount of house tax as well as construction / repairing of wall, and in that dispute all the Accused got excited and committed the said offence. Therefore, according to us, the complicity of the Accused for commission of the crime is duly established beyond reasonable doubt.

22. The next question which requires consideration of this Court is as to what offence has been committed by the Accused. As per the evidence, Accused No.1 inflicted two fatal blows on the deceased with the weapon. PW-1 Dr. Manubhai Ishabhai Ishanava has also recorded these two injuries in his autopsy report whereas Accused Nos. 2 and 3 have inflicted injuries with Bat and Bricks as well as with knife. In aforesaid view of the matter it has to be held that intention of Accused No. 1 was to kill the deceased. Therefore, he has committed the offence of murder, punishable under Section 302 IPC whereas Accused Nos. 2 and 3 have committed the offence of “culpable homicide not amounting

to murder under" punishable under Section 304 Part II IPC, as the intention cannot be attributed to them and only knowledge can be attributed to them that with such an injury the deceased would die. In aforesaid view of the matter, according to us, the trial Court has very rightly convicted Accused No.1 for the offence punishable under Section 302 IPC and Accused Nos. 2 and 3 for the offence punishable under Section 304 Part II IPC.

23. We find ourselves in complete agreement with the aforesaid finding, ultimate conclusion and the resultant order of conviction and sentence, as according to us, no other finding, conclusion or order is possible except the one reached by the trial Court, which is required to be affirmed by us.

24. Seen in the above context, there is no reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence passed by the trial Court, and as both the Appeals lack merit, deserve to be dismissed by confirming the judgment and order passed by the trial Court.

25. For the foregoing reasons, both the Appeals fail and accordingly they are dismissed. Resultantly the judgment and order of conviction and sentence dated 30.12.1998 rendered in Sessions Case No.265 of 1997 by the learned Additional Sessions Judge, Nadiad, is hereby confirmed and maintained.

26. As per the jail remark sheet as well as order dated 27.2.2004 passed in Criminal Misc. Application No. 1922 of 2004, Accused No.1 has been released on regular bail during the pendency and final disposal of the Appeal whereas Accused Nos. 2 and 3 have already undergone the sentence imposed upon them and released from jail, therefore, it is ordered that Accused No.1 shall surrender before the jail authority to serve out the remaining period of sentence, failing which, the learned Additional Sessions Judge, Nadiad shall issue non-bailable warrant to procure his presence and then to send him to jail to serve out the remaining period of sentence.

(A.M.Kapadia,J)

(H.N.Devani,J)

Jayanti*